Nos. 90-711 and 90-712

In the Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE C. PRESLEY, ETC., APPELLANT

v.

ETOWAH COUNTY COMMISSION, ET AL.

ED PETER MACK, ET AL., APPELLANTS

v.

RUSSELL COUNTY COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTIONS PRESENTED

The ultimate question presented in both cases is whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a "change with respect to voting" covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, regardless of whether the officials serve the same or different voting constituencies and regardless of whether the transferred authority is more or less important than other duties of the office.

1. In No. 90-711, the specific question is whether a county commission's decision to transfer authority to determine road work priorities from individual commissioners elected from single-member districts to the entire commission is a change "with respect to voting" under Section 5.

2. In No. 90-712, the specific question is whether a State's transfer of road work authority from county commissioners elected at large from residency districts to a county engineer appointed by the commission is a change "with respect to voting" under Section 5.

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INTEREST OF THE UNITED STATES

These consolidated appeals present the question whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a change "with respect to voting" subject to preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the Attorney General is responsible for reviewing voting changes submitted by covered jurisdictions for administrative pre-

clearance. The Attorney General also has authority under the Act to bring actions to prevent unprecleared changes from taking effect. The Court's resolution of these cases will affect the scope of the Attorney General's duties under Section 5.

On April 11, 1991, in response to this Court's invitation, the Solicitor General submitted a brief expressing the views of the United States. The brief generally supported appellants' position and recommended that the Court note probable jurisdiction in both cases. The United States also participated as an amicus curiae in the district court.

STATEMENT

1. On November 1, 1964 (the date Section 5 of the Voting Rights Act became applicable to appellees, see 42 U.S.C. 1973b(b)), the Etowah County Commission consisted of five members: four commissioners elected at large but required to reside in separate "residency districts," and a chairman elected at large. J.S. App. A4.[1] The four commissioners each exercised complete control over a road shop, crew and equipment in their respective residency districts. *Ibid.* The commission allocated road funds to each district based on projected need. *Ibid.* The four "road commissioners" then unilaterally determined work priorities in their own districts. *Ibid.*

In 1986, the Commission entered into a consent decree resolving litigation under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. J.S. App. A4-A5. The decree expanded the Commission to six members, all of whom eventually would be elected from single-member districts. *Id.* at A5. Two commissioners were elected from districts in December 1986; Appellant Presley, the

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[1] The district court's opinion is reproduced in the appendices to the Jurisdictional Statements in both No. 90-711 and No. 90-712; references herein to "J.S. App." may be found in the appendix to either filing.

first black commissioner in Etowah County in recent history, is one of these two. Under the decree, two of the at-large holdovers ran from districts and were elected in 1988; the other two were to run from districts in 1990. *Ibid.*

The consent decree specified that the commissioners elected in 1986 were to have the same duties as the four holdovers. J.S. App. A5. In August 1987, however, the Commission passed a "road supervision" resolution providing that each of the four holdover commissioners would continue to exercise authority over road operations in their districts. *Ibid.* The resolution further provided that the "old four" would oversee road work throughout Etowah County. *Id.* at A5-A6. The resolution assigned non-road duties to the two new commissioners. *Id.* at A6. The effect of the resolution was to strip the two new commissioners of any supervisory authority over road operations. Not surprisingly, the road supervision resolution was passed by a vote of four to two, over the opposition of the two new commissioners. *Id.* at A5.

On the same day, the Commission adopted a second resolution by an identical vote of four to two. J.S. App. A6-A7. This resolution abolished the practice of allocating road funds to districts. Instead, the resolution provided that road funds would be retained in a common fund for use without regard to district lines. *Ibid.* The effect of this "common fund" resolution was to transfer authority to determine funding priorities from individual commissioners to the entire commission. Neither the road supervision resolution nor the common fund resolution was submitted for preclearance.

2. On November 1, 1964, the Russell County Commission consisted of three members elected at large from "residency districts." J.S. App. A2. In 1972, as a result of a court order to comply with the one-person, one-vote rule, the Commission was expanded from three to five members. Phenix City, the largest city in the county, became the fourth residency district; two commissioners were required to reside there. *Ibid.*

Under the system adopted in 1972, each of the three rural commissioners exercised authority over a separate road shop. J.S. App. A2. (The two Phenix City commissioners lacked such authority, because Russell County generally does not fund or maintain city roads. See *id.* at A2 n.2). The three rural commissioners each set road work priorities, bought equipment, and hired and managed personnel within their districts. *Id.* at A2-A3. Each commissioner also approved funding for routine work. *Id.* at A3. Funding for new or major construction, however, required Commission approval. *Id.* at A3 n.3. A county engineer, appointed by the Commission, assisted the road commissioners in carrying out their responsibilities. *Id.* at A3.

In 1979, after an investigation uncovered corruption in Russell County's road operations, the Alabama legislature enacted a statute transferring all responsibility for road work to the county engineer. J.S. App. A3. The 1979 statute requires the engineer to perform road work without regard to district lines, thereby establishing what is known as a "unit system." *Ibid.* The 1979 statute was not submitted for preclearance.

In 1985, the Commission entered into a consent decree to resolve litigation under Section 2 of the Voting Rights Act. J.S. App. A4. Under this decree, the Commission was expanded from five to seven members, with each member elected from a single-member district. *Ibid.* Appellants Mack and Gosha were elected to office under this system in 1986, and became the first two black commissioners in recent history. *Ibid.*

3. In 1989, appellants filed suit in federal district court alleging that the conduct of road operations in Etowah and Russell Counties violated previous court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act. J.S. App. A7. Thereafter, appellants amended their complaint to allege that Russell County's failure to preclear its transfer of road authority to the

county engineer, and Etowah's failure to preclear the road supervision and common fund resolutions, violated Section 5 of the Voting Rights Act. *Ibid.* A three-judge court was convened to consider the Section 5 claims. *Id.* at A7-A8.

The court held that transfers of authority are subject to Section 5 preclearance when they "effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters." J.S. App. A13-A14. Since minority groups often have different levels of voting strength in different constituencies, the court explained, a transfer of authority from an official elected by one constituency to an official elected by another may have a potential for discrimination. *Id.* at A14. Such a potential is unlikely to exist, the court thought, when the officials are elected by the same constituency. *Ibid.* Even when officials with different constituencies are involved, the court added, "minor or inconsequential" transfers of authority do not have a "significant potential impact on voting rights." *Ibid.*

Applying these principles, the court concluded that Russell County's transfer of road supervision authority from the individual commissioners to the county engineer was not a change covered by Section 5, because both the commissioners and the engineer ultimately were answerable to the same constituency—the entire Russell County electorate. J.S. App. A16-A18. Although individual commissioners were required to reside in a particular district, the court explained, they "were elected by, and thus politically responsible to, all the voters of Russell County." *Id.* at A16. Similarly, the county engineer, although appointed, is responsible to the commission, and that body is responsible to all county voters. *Id.* at A16-A17.

The court also concluded that Etowah County's common fund resolution did not require preclearance. The court acknowledged that the common fund resolution transferred authority between officials with different con-

stituencies. Before enactment of the resolution, individual commissioners elected from, or facing election from, single-member districts could determine priorities for road repair in their own districts; afterwards, the entire commission had this authority. J.S. App. A18-A19. The court nonetheless concluded that this change did not affect voting since the power to set internal priorities was "minor and inconsequential" compared to the entire commission's authority, both before and after the resolution, to determine the amount of money to be allocated to each district. *Id.* at A19.

In contrast, the court held that Etowah County's road supervision resolution was covered by Section 5. J.S. App. A20-A21. The court concluded that "[t]he potential for discrimination posed by this change is blatant and obvious." *Id.* at A20. The court explained that "[w]hereas before 1987 all the voters of Etowah County participated in choosing the commissioners responsible for road management, the 1987 resolution stripped the voters in [two] districts * * * of any electoral influence over such commissioners." *Ibid.* Thus, "[a]uthority over the most important aspect of county governance was shifted from officials responsible to the entire county to officials (albeit the same individuals) responsible to only two thirds of the county's voters." *Id.* at A20-A21.[2]

Judge Thompson dissented in part. He agreed with the majority that Etowah County's road supervision resolution was subject to the preclearance requirement, but dissented from the court's conclusion that the common fund resolution did not require preclearance. J.S. App. A27-A33. In concluding that the power to set internal priorities was comparatively insignificant, Judge Thompson said, the majority ignored the realities of road operations in Etowah County. *Id.* at A32. The allocation of funds among districts "has never been a bone of con-

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[2] Etowah County subsequently repealed the road supervision resolution, and has not cross-appealed from this portion of the district court's ruling. 90-711 Mot. to Aff. 2 n.3.

tention." *Ibid.* Instead, a "commissioner's real authority lies * * * in how those funds are used after they are allocated." *Ibid.* In Judge Thompson's view, "[t]he common fund resolution and the road supervision resolution, working together, took this authority away from the two new commissioners and gave it exclusively to the four holdover commissioners." *Ibid.*

Judge Thompson also dissented from the court's conclusion that Russell County's transfer of road authority from individual commissioners to the county engineer did not constitute a change affecting voting. J.S. App. A33-A35. According to Judge Thompson, the court's holding ignored the possibility that the commissioners might have been more accountable to voters in their residency districts than to those outside their districts. *Id.* at A34. More fundamentally, Judge Thompson disagreed with the majority's conclusion that transfers of authority are covered by Section 5 only when they occur between officials with different constituencies. Pet. App. A35-A36. The question whether there is a potential for discrimination, he thought, should not be decided on the basis of a rigid rule. *Id.* at A37-A38. If a limiting principle were required, Judge Thompson stated, he would find it sufficient for plaintiffs to show that "there has been a *significant* and *fundamental* change in the nature of the duties traditionally exercised by elected officials." *Id.* at A38.

SUMMARY OF ARGUMENT

1. A change in the decisionmaking power of an elected official is a change "with respect to voting" covered by Section 5 of the Voting Rights Act. Congress intended Section 5 to be applied broadly. In deciding whether a change is subject to preclearance, the court's inquiry is limited to whether the change has the *potential* for discrimination. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Moreover, any change with respect to voting, no matter how small or minor, is

subject to preclearance. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566-568 (1969). In addition, it is now firmly established that Section 5 applies not only to practices that directly affect voter registration and balloting, but to all practices that affect "the power of a citizen's vote." *Id.* at 569.

Some reallocations of the power of elected officials plainly affect the power of a citizen's vote. For example, eliminating all the powers of an elected body would reduce citizens' votes for members of that body to a nullity. Because such changes could have a racial purpose or effect, they have the potential for discrimination and are covered by Section 5.

If all reallocations of authority were outside the scope of Section 5, a covered jurisdiction could negate the election of a candidate favored by minority voters simply by reallocating the successful candidate's authority to other elected or appointed officials. That would defeat the purpose of Section 5, which is to bar measures that would "evade the remedies for voting discrimination contained in the Act itself." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). Accordingly, the lower courts and the Department of Justice consistently have recognized that some reallocations of authority are covered by Section 5.

We agree with the district court that not all changes in the powers of elected officials are subject to preclearance. But we disagree with the standard devised by the district court, which requires preclearance only if the change involves (1) officials responsible to different constituencies, and (2) relatively important duties. In our view, transfers of authority are covered by Section 5 when they implicate an elected official's *decisionmaking* authority. Such changes go to the core of a citizen's voting power, and therefore are subject to preclearance.

The district court erred in concluding that transfers between officials who serve the same constituency have no potential for discrimination. Transfers of power from

a larger to a smaller body, or from a body for which single-shot voting is permitted to one for which such voting is prohibited, for instance, obviously have the potential to be discriminatory, even though both bodies are elected by the same constituency. In fact, the Attorney General has objected to transfers of authority between officials serving the same constituency on at least three occasions. In addition, the "same constituency" rule is inconsistent with this Court's decision in *City of Lockhart* v. *United States*, 460 U.S. 125 (1983), which held that expansion of a body from three to five members required preclearance even though both the smaller body and the larger body were elected by the same constituency.

The district court also erred in concluding that relatively unimportant transfers of authority are not subject to preclearance. The statute plainly states that Section 5 applies to *"any* * * * standard, practice, or procedure with respect to voting," 42 U.S.C. 1973c (emphasis added), and it is well settled that there is no *de minimis* exception to the preclearance requirement. See *Allen*, 393 U.S. at 566. An exception for "minor" transfers of authority would be difficult to administer and would undermine the prophylactic purpose of Section 5. The district court's standard also blurs the distinction between the question whether a change is subject to preclearance (which turns on whether changes of that type have the potential for discrimination) and the question whether the change should be precleared (which turns on whether the particular change at issue would have a discriminatory purpose or effect). Because changes in the decisionmaking power of an elected official have the potential for discrimination, all such changes are subject to preclearance. Whether the purpose or effect is present, and the weight to be given the State's legitimate interests, are matters to be considered after the submission has been made.

2. The reallocations of authority at issue here must be submitted for preclearance. In Russell County, decision-

making authority concerning road matters was transferred from individual commissioners elected at large to a county engineer appointed by the commission. Similarly, Etowah County's common fund resolution transferred authority to decide the priority of road projects from individual commissioners elected from single-member districts to the commission as a whole.

ARGUMENT

I. A CHANGE IN THE DECISIONMAKING POWER OF AN ELECTED OFFICIAL IS A CHANGE WITH RESPECT TO VOTING REQUIRING PRECLEARANCE UNDER SECTION 5

The central question presented by these appeals is whether a change in the decisionmaking authority of an elected official is a change "with respect to voting" under Section 5 of the Voting Rights Act of 1965. The district court held that such changes are covered by Section 5, but only when they involve a "significant relative change" in power between officials who are "elected by, or responsible to, substantially different constituencies of voters." J.S. A13-A14. We agree that a change in an elected official's authority can be a change with respect to voting. In our view, however, a change in the decisionmaking authority of an elected official is covered by Section 5 even if the officials involved are responsible to the same constituency, and even if the authority at issue may be viewed as relatively minor or inconsequential. Under this standard, the changes at issue here require preclearance.

A. Section 5 Applies To All Changes That Affect "The Power Of A Citizen's Vote"

Section 5 of the Voting Rights Act provides that certain States and political subdivisions, including appellees, may not implement "any voting qualification or prerequisite to voting, or any standard, practice, or procedure

with respect to voting" without first obtaining preclearance from the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c. To receive preclearance, a covered jurisdiction must show that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Ibid.*

This Court has recognized that Section 5 draws a sharp distinction between the procedural question whether a change is subject to preclearance and the substantive question whether the change should be precleared. In deciding the first question, a court may not inquire into whether the change has a discriminatory purpose or effect. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *McCain* v. *Lybrand*, 465 U.S. 236, 250 n.17 (1984); *Perkins* v. *Matthews*, 400 U.S. 379, 383-385 (1971). Instead, the inquiry is limited to whether the challenged alteration has the "*potential* for discrimination." *Hampton County*, 470 U.S. at 181; *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 42 (1978). Moreover, a court may not exempt from preclearance changes it views as insignificant. The plain language of the statute makes the preclearance requirement applicable to *any* change with respect to voting, no matter how small or minor. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566-568 (1969) ("It is significant that Congress chose not to include even * * * minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny."). See also *Perkins* v. *Matthews*, 400 U.S. at 387. See generally *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 25 (1989) (Courts "are not at liberty to create an exception where Congress has declined to do so").

The Voting Rights Act defines "vote" and "voting" to include "all action necessary to make a vote effective." 42 U.S.C. 1973*l*(c)(1). Relying on this broad definition, and Congress's refusal to make any exceptions to Section 5's

preclearance requirement, this Court held in *Allen* that Section 5 is not limited to changes directly affecting the casting of a ballot. 393 U.S. at 563-569. The Court explained that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 569. *Allen* held, *inter alia*, that a change from district to at-large voting, and a change from an elected county superintendent of education to a superintendent appointed by the board of education, were covered by Section 5.[3] 393 U.S. at 569-570.

In subsequent cases, this Court has reaffirmed the broad definition of Section 5 coverage adopted in *Allen*. In *Perkins* v. *Matthews*, 400 U.S. 379 (1971), the Court held that annexations which enlarge the number of eligible voters are covered by Section 5 because they dilute "the weight of the votes of the voters to whom the franchise was limited before the annexation." 400 U.S. at 388. In *Georgia* v. *United States*, 411 U.S. 526, 532-533 (1973), the Court held that Section 5 applies to legislative reapportionments since they too can dilute minority voting power. And in *City of Lockhart* v. *United States*, 460 U.S. 125, 131-132, 134-135 (1983), the Court held that the preclearance requirement applies to the introduction of numbered posts and staggered terms, because such devices may frustrate the use of single-shot voting, a technique that permits minority voters to concentrate their vote behind a single candidate. *Id.* at 135.

Congress reenacted Section 5 in 1970, 1975, and 1982. With each reenactment, Congress has reaffirmed the validity of *Allen*'s interpretation of congressional intent. See S. Rep. No. 417, 97th Cong., 2d Sess. 6-7 (1982); S. Rep. No. 295, 94th Cong., 1st Sess. 16 (1975); *Dougherty County Bd. of Educ.*, 439 U.S. at 38-39; *Georgia* v. *United States*, 411 U.S. at 533. Thus, it is now firmly established that the preclearance requirement applies not only to prac-

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[3] In all, the Court's opinion in *Allen* decided three consolidated cases from Mississippi and one case from Virginia. See 393 U.S. at 547.

tices that directly affect the process by which voters are registered and cast their ballots, but also to all practices that affect "the power of a citizen's vote." *Allen*, 393 U.S. at 569.

B. Some Reallocations Of Authority Are Covered By Section 5

Some changes in the powers of an elected official plainly affect the power of a citizen's vote and therefore are covered by Section 5. To take an extreme example, a change eliminating *all* of a county commission's powers and making that body purely ceremonial would reduce the citizen's vote for county commissioners to a virtual nullity. Cf. *Allen*, 393 U.S. at 569-570 (change making an elective office appointive is covered by Section 5). Less drastic changes in the authority of an elected body can also affect the power of a citizen's vote. For example, stripping a school board of its power to set the tax rate would diminish the voting power of citizens who vote in school board elections, even if the school board were to retain other significant powers. After the change, a vote for school board members, although not meaningless, would mean less than it did before. And such a diminution in voting power could have a racial purpose or effect and thus have the potential for discrimination.

Although this Court has not yet decided whether changes in the powers of an elected official or group of officials are covered by Section 5, the Court has held that a change from a three-member elected body to a five-member elected body required preclearance, because it changed the voting power of the individual members of the three-member body. *City of Lockhart* v. *United States*, *supra*. As the Court explained in *Lockhart*, "[i]n moving from a three-member commission to a five-member council, [the city] has changed the nature of the seats at issue. * * * For example, [two of the old seats] now constitute only 40% of the council, rather than 67% of the commission." 460 U.S. at 131. Given *Lockhart*'s hold-

ing that reducing the power of an individual *member* of an elected body by increasing the size of the body requires preclearance, it is difficult to see how reducing the power of the entire elected *body* can fall outside the scope of Section 5.[4]

A decision excluding all reallocations of authority from the scope of Section 5 would have far-reaching consequences. Since the enactment of the Voting Rights Act, minority voters in many jurisdictions have elected candidates of their choice to office for the first time in recent history. If transfers of authority were not subject to preclearance, a jurisdiction could negate the election of a minority candidate to a governing body by taking away the official's authority and reallocating it to other officials over whom minority voters have less influence. This would defeat the purpose of Section 5, which is to prevent covered jurisdictions from implementing measures that would "evade the remedies for voting discrimination contained in the Act itself." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966).

The Etowah County case illustrates this danger. Immediately after a minority-supported candidate was elected to office for the first time in recent memory, the commission stripped him of all authority over road work. The district court found that the potential for discrimination against minority voters posed by this change was "blatant and obvious." J.S. App. A20.

The lower courts have uniformly concluded that a change in the authority of elected officials can be a change with respect to voting. In *Horry County* v. *United*

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[4] In *McCain* v. *Lybrand*, 465 U.S. 236 (1984), state legislation changed the governing body of a county from an appointed commission to an elected council with increased legislative powers. The parties stipulated that this legislation incorporated changes with respect to voting, and the Court therefore was not required to address the issue. The Court nevertheless noted that "several changes are suggested," including "the basic reallocation of authority from the state legislative delegation to the Council." 465 U.S. at 250 n.17.

States, 449 F. Supp. 990 (D.D.C. 1978) (three-judge court), a state statute increased the powers of the county commission and provided that commissioners would be elected rather than appointed by the governor. The statute also transferred most of the duties of the county chairman to an administrator appointed by the commission. The court held that the first change "reallocate[d] governmental powers among elected officials voted upon by different constituencies," and therefore was subject to preclearance. *Id.* at 995. The court also concluded that the duties of the chairman "are sufficiently different that in this respect [the statute] constitutes a change in electoral practices requiring preclearance under Section 5 of the Voting Rights Act." *Ibid.* Similarly, in *Hardy* v. *Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), a state statute transferred the authority to appoint the Greene County racing commission from the county's state legislative delegation to the governor. The court held that this change was subject to Section 5 preclearance because of "its effect on the power of the voters." *Id.* at 178. The court explained that "the transfer of appointment authority to the governor, over 99.7% of whose constituents are not inhabitants of Greene County, substantially dilutes the power of the voters in Greene County by effectively eliminating the power of such voters over the Commission." *Id.* at 179.[5] See also *County Council of Sumter County* v. *United States*, 555 F. Supp. 694 (D.D.C. 1983) (three-judge court) (transfer

[5] The Department of Justice originally concluded that the legislation at issue in *Hardy* v. *Wallace* was subject to preclearance, relying in part on *Horry County* v. *United States*, *supra*. See 603 F. Supp. at 179-180 (decision letter of June 18, 1984). On reconsideration, the Department concluded that while "it would be wrong to conclude that no reallocation of governmental power can ever be considered a change 'with respect to voting,'" the particular change at issue was not covered by Section 5. See 603 F. Supp. at 181-182 (decision letter of Oct. 31, 1984). Further experience with Section 5 has now led us to the view that we were right the first time, as the court in *Hardy* v. *Wallace* determined. See pp. 17-23, *infra*.

of legislative power formerly shared by county legislative delegation, state legislature, and governor to local governing body requires preclearance); *Robinson* v. *Alabama State Dep't of Educ.*, 652 F. Supp. 484 (M.D. Ala. 1987) (transfer of authority from county school board to city school board requires preclearance).

The Attorney General, whose interpretation of Section 5 is entitled to "considerable deference," *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. at 178-179, has long treated certain changes in the power of elected officials as changes with respect to voting. The Department of Justice first focused on reallocations of authority in 1975, when South Carolina enacted "home rule" legislation authorizing its counties to adopt their own forms of local government and to assume increased powers. The Department precleared this enabling legislation, but notified the State that each implementation of it by a local government would require a separate preclearance. The State sought clarification of whether preclearance would be required in cases in which the county assumed increased powers but retained its existing form of government. In response, the Department stated that "changes in the powers and duties of the governing entity brings the transition within the purview of Section 5 even though the structure of the governing body remains the same." Letter from J. Stanley Pottinger to Daniel R. McLeod (Dec. 19, 1975) *reprinted in* App., *infra*, 2a. Since 1975, the Department of Justice consistently has treated home rule and other similar transfers of authority as changes with respect to voting requiring preclearance under Section 5. During this period, we have objected to transfers of authority on at least eight occasions.[6] In addition, the

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[6] The Department has objected to the following transfers of authority: (1) Mobile, Alabama, March 2, 1976, involving a transfer of administrative duties from the entire commission to individual commissioners; (2) Charleston, South Carolina, June 14, 1977, involving a transfer of taxing authority from the legislative delegation to the county council; (3) Edgefield County, South Carolina,

Department has precleared numerous other transfers of authority submitted by jurisdictions after finding the absence of discriminatory purpose and effect.

C. Changes In The Power Of Elected Officials Are Subject To Preclearance When The Changes Reallocate Decisionmaking Authority

In our view, the hard question in this case is not whether a change in the power of an elected official can ever constitute a change with respect to voting requiring preclearance under Section 5—it plainly can—but rather whether the district court employed the correct standard to distinguish those changes that require preclearance from those that do not. The Department of Justice considered this question when it amended its Section 5 regulations in 1987, but did not attempt to provide an all-encompassing answer. At that time, we stated that "[w]hile we agree that some reallocations of authority are covered by Section 5 (*e.g.*, * * * 'home rule'), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations." J.S. App. A15 n.13.

Since 1987, several cases, including this one, have forced us to grapple with this issue further and have led us to conclude that transfers of authority that implicate

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February 8, 1979, involving a transfer of increased taxing power to the county council; (4) Colleton County, South Carolina, September 4, 1979, involving a transfer of authority to tax for school purposes from the legislative delegation to the county council; (5) Brunswick and Blynn County, Georgia, August 16, 1982, involving the abolition of separate city and county commissions and the transfer of their powers to a consolidated commission; (6) Hillsborough County, Florida, August 29, 1984, involving a transfer of power over municipalities from the legislative delegation to the county commission (objection was withdrawn because the county made clear that it did not intend to effect such a transfer); (7) Waycross, Georgia, February 16, 1988, involving a change in the duties of the mayor; and (8) San Patricio, Texas, May 7, 1990, involving a transfer of voter registration duties from the county clerk to the county tax assessor.

an elected official's *decisionmaking authority* are covered by Section 5. Changes that affect an elected official's authority to make decisions—to legislate, tax, spend, set school curricula, approve road and bridge projects, and so forth—go to the core of the citizens' voting power. Changes that do *not* affect an official's power to make decisions generally have no such potential to dilute the power of a citizen's vote. Although such changes may be of interest to the officeholders, officeholders are not protected by Section 5. Accordingly, such changes are outside the scope of Section 5.[7]

The district court adopted a different standard for distinguishing between covered and uncovered changes. According to the district court, transfers in authority are covered only when they (1) involve officials who are responsible to different voting constituencies, and (2) the duties transferred are not minor or inconsequential. These limitations cannot be squared with the language and purposes of Section 5.

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[7] The decision in *Rojas* v. *Victoria Indep. School Dist.*, Civ. A. No. V-87-16 (S.D. Tex. Mar. 29, 1988), aff'd, 490 U.S. 1001 (1989), illustrates this distinction. In *Rojas*, a school board replaced its rule that any board member could place items on the board's agenda with a rule giving the board president authority to require that items be placed on the agenda only at the request of two board members. This change did not affect the range of matters over which the school board could make decisions. Nor did it affect the power of individual members to influence those decisions, since decisions of the board required a majority vote both before and after the change. Moreover, the board's rules of procedure required a second to initiate discussion or bring a matter to a vote. Accordingly, the new agenda setting policy was not a change "with respect to voting" requiring preclearance under Section 5. For the same reason, a transfer of authority from a legislative body to a committee to make recommendations concerning proposed legislation would not be covered by Section 5, because the entire body retains the authority to decide whether to adopt the legislation. More generally, a transfer of authority to give advice or make recommendations would also be outside the reach of Section 5.

1. *The District Court's "Different Constituency" Rule Is Too Narrow*

The district court correctly recognized that transfers between officials with different voting constituencies can create the potential for discrimination, since "identifiable racial or ethnic groups of voters will often have different levels of voting strength in different constituencies." J.S. App. A14. The court erred, however, in concluding that transfers of authority between officials who serve the same constituency have no discriminatory potential.

To cite one example, if two elected bodies serve the same constituency, but one has many members while the other has only a few, minority voters may have a greater opportunity to elect a candidate of their choice to the larger body. See *City of Lockhart*, 460 U.S. at 136 (minority voters elected a candidate of their choice for the first time when the council expanded from three to five members). Consequently, a transfer of authority from the larger to the smaller body would have the potential to discriminate against minority voters. Similarly, if minority voters use single-shot voting to elect their preferred candidate to a county school board, and the authority to tax for school purposes is then shifted to a county commission where single-shot voting is prohibited, there is a potential for diluting minority voting strength, even if both the school board and the commission are elected at large by all residents of the county. Still again, if minority voters elect a mayor of their choice because of special circumstances (*e.g.*, the minority candidate ran unopposed, see *Thornburg* v. *Gingles*, 478 U.S. 30, 51 (1986)), and authority to appoint city officials is then transferred to the city council, the change is potentially discriminatory even where both the mayor and the city council are chosen by the same electorate.

Our disagreement with the district court's "different constituency" rule is by no means academic. On at least three occasions, the Attorney General has objected to transfers of authority between officials serving the same

constituency. In one case (Mobile, Alabama, March 2, 1976), a three-member commission elected at-large sought to transfer administrative responsibilities exercised by the entire commission to individual members of the commission. Our investigation disclosed that the purpose of this reallocation was to forestall any possibility of a change to single-member districts (on the theory that it would be inappropriate to permit one area of the city to elect an official with city-wide responsibilities). In another case (Colleton County, South Carolina, September 4, 1979), the State transferred the authority to levy taxes for school purposes from the county's state legislative delegation to the county council, both of which were elected at-large by county residents. Our investigation uncovered evidence that the representatives to the legislative delegation had sought the support of black voters and had been responsive to their needs, while representatives to the county council had not. In the third case (San Patricio, Texas, May 7, 1990), the Attorney General objected when a county transferred the authority to register voters from the county clerk to the county tax assessor, both of whom are elected at-large by the entire county. Our investigation revealed that the purpose of the change was to retaliate against the county clerk for cooperating in a Section 5 review of an unrelated voting change. These objections demonstrate that the district court's "different constituency" test too narrowly defines the circumstances under which preclearance should be required.

In addition, the district court's "different constituency" rule is inconsistent with *Lockhart*. As discussed above, this Court held that the transfer of power from a three-member body to a five-member body was covered by Section 5, even though both bodies served the same voting constituency. Under the district court's "same constituency" rule, such a change would be outside the scope of Section 5. See also *Horry County*, 449 F. Supp. at 995-996 (transfer of administrative functions from chair-

man elected at-large to administrator appointed by Council elected at large is a covered change).

2. *There Is No Exception To Section 5 For Minor Changes*

The district court also erred in holding that transfers of authority that can be characterized as relatively minor or inconsequential need not be precleared under Section 5. The district court concluded that such transfers do not require preclearance because they do not have "a significant potential impact on voting rights." J.S. App. A14. But that is not the statutory test; as noted above, the preclearance requirement is not limited to changes with a "significant" impact on voting rights. On the contrary, the language of the statute makes the preclearance requirement applicable to "any • • • standard, practice, or procedure with respect to voting," no matter how small or minor. 42 U.S.C. 1973c; see *Allen*, 393 U.S. at 566. When minority voters lose the power to use their vote to affect a governmental decision, their voting power has been diminished. That they retain the power to influence what a court may regard as more important matters does not redeem that loss.

Not only does the district court's approach lack roots in the statute itself, but its standard would be difficult to administer. In many cases, the Department of Justice would find it necessary to conduct an extensive investigation simply to decide whether a change is subject to preclearance. Covered jurisdictions would face a similar burden in deciding whether they are required to submit a change. Even after investigation, it may not be clear on which side of the line a particular change falls. Matters that are very important to some voters may be of no importance at all to others. For these reasons, the district court's standard would invite litigation in every case to determine the question of coverage. That baleful result would defeat the purpose of administrative preclearance, which is "to provide a speedy alternative method of com-

pliance to covered States." *Morris* v. *Gressette*, 432 U.S. 491, 503 (1977). More fundamentally, the district court's standard would undermine the prophylactic purpose of Section 5 by permitting the covered jurisdiction to decide whether a transfer of authority is important enough to require preclearance. See *McCain*, 465 U.S. at 246 (Section 5 must be interpreted "in light of its prophylactic purpose and the historical experience which it reflects").

3. *The District Court's Standard Confuses The Questions Whether A Change Is Subject To Preclearance And Whether The Change Should Be Precleared*

The district court's standard also blurs the distinction between the procedural question whether a change must be submitted for preclearance and the substantive question whether the change should be precleared. This Court's decision in *Perkins* v. *Matthews*, *supra*, illustrates the difference between these two inquiries. In *Perkins*, the district court held that a jurisdiction's annexation did not have to be precleared because blacks still constituted a majority of the voters after the annexation. 400 U.S. at 385-386. Similarly, the court did not require the jurisdiction to preclear a change from single-member districts to at-large elections because blacks would still have the power to elect the candidates of their choice in at-large elections. Finally, the district court held that changes in the location of polling places did not require preclearance since the changes were dictated by necessity.

This Court reversed, holding that the district court had effectively inquired into the *merits* of whether the changes had the purpose or effect of discriminating against minority voters—a function reserved for the Attorney General and the United States District Court for the District of Columbia. 400 U.S. at 386. The Court explained that annexations that enlarge the number of eligible voters, changes to at-large election systems, and changes in polling places are practices that can, in particular cases, dis-

criminate against minority voters. Accordingly, this Court held that all such changes must be precleared. *Id.* at 387-394.

That principle applies here. A change in the decision-making power of an elected official has an effect on the voting power of those who vote for that official, and that type of change has the potential to discriminate against minority voters. Accordingly, all such changes must be submitted for preclearance, including those that appear innocuous. To be sure, a showing that the officials serve the same constituency, and that the transfer is a minor one, may be important evidence that a transfer of authority is without a discriminatory purpose or effect and should be precleared. But those factors do not eliminate the requirement that the change undergo the preclearance process.[8]

II. THE CHANGES AT ISSUE HERE REALLOCATED THE DECISIONMAKING POWERS OF ELECTED OFFICIALS, AND THEREFORE ARE SUBJECT TO PRECLEARANCE UNDER SECTION 5

For the reasons discussed above, the reallocations of authority at issue here must be submitted for preclearance under Section 5. In Russell County, decisionmaking authority over road matters was transfered from indi-

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[8] We have no quarrel with the district court's observation that Section 5 "is not to be stretched beyond the point of reason and beyond its legitimate purposes." J.S. App. A22 n.21. Congress did not intend to overwhelm the Attorney General with preclearance submissions. Cf. *Clark* v. *Roemer*, No. 90-952 (June 13, 1991), slip op. 11. Nor did it intend to require the States to delay implementation of any and all changes that can be linked to voting through an imaginative exercise in the conceivable. But these concerns are satisfied by limiting Section 5 coverage to changes in an elected official's decisionmaking authority. Unlike the district court's standard, this approach is consistent with the language and legislative history of Section 5, is faithful to its prophylactic purpose, and affords a reasonable degree of certainty about whether a particular change is covered.

vidual commissioners, elected at large from residency districts, to the county engineer, who is appointed by the Commission. The district court held that the change was not covered because it involved officials who serve the same constituency. For the reasons noted above, however, that is not sufficient to eliminate the potential for discrimination and therefore does not place the change outside the scope of Section 5. The public policy reasons for adopting the unit system may well support preclearance once the change is submitted. And the fact that the commissioners are answerable to all the voters of Russell County, and the county engineer is answerable to the commissioners, may also support the County's argument for preclearance.[9] But those facts do not obviate the need to go through the process.

The Etowah common fund resolution also requires preclearance. That resolution removed the power of individual commissioners to decide which road projects in their districts would receive priority. Consequently, it involved a transfer of decisionmaking power concerning "the most important aspect of county governance" (J.S. App. 20) from one set of officials to another. See Ala. Code § 23-1-80 (1975 & Supp. 1990) (principal responsibility of county commissions is to maintain roads and bridges). The district court held that preclearance was

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[9] Although the district court concluded that the county commissioners and the county engineer answered to the same constituency, in fact appointed officials generally are not "answerable" to the electorate in the same sense as elected officials. (If they were, changes in the authority of *appointed* officials would be no less subject to preclearance than changes in the decisionmaking authority of *elected* officials.) Appointed officials may be subject to job protection of various kinds that insulates them from elected officials and voters. Even where an appointed official serves at the pleasure of an elected official, moreover, a vote against the elected official does not automatically translate into a "vote" against the appointed official. See *Allen*, 393 U.S. at 569-570 (holding that change from elected superintendent of education to superintendent appointed by the board of education is subject to preclearance).

not required because the power to set internal priorities is not as important as the power to determine overall funding. While this may be so, voters clearly have an interest in how both functions are performed. If the road to a voter's home is one the voter's commissioner would schedule for paving but the county commission as a whole would not, the transfer of authority to set road work priorities from the former to the latter may be—to that voter—an extremely important change.

The Etowah common fund resolution was passed while the Commission was undergoing a transition from an at-large system to single-member districts. Good government considerations might well call for different allocations of powers depending on whether members of an elected body serve specific districts or at large. At-large members may, for example, be expected to have the concerns of the entire county in mind in setting priorities, while members serving only a specific district might have more parochial concerns. The State's legitimate public policy reasons for a change are appropriately weighed in determining whether that change should be precleared. See *Houston Lawyers' Ass'n* v. *Texas Attorney General*, Nos. 90-813 & 90-974 (June 20, 1991), slip op. 6 ("State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry."). But the facts of the Etowah County case illustrate why such justifications should be weighed during the preclearance process. As a result of the common fund resolution, individual commissioners were stripped of their power to determine district funding priorities almost immediately after minority voters were able to elect a commissioner of their choice for the first time. Such a change clearly warrants Section 5 review.[10]

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[10] In No. 90-712, appellants contend (J.S. 4-6) that a change with no potential for discrimination at the time it is implemented (and therefore not subject to preclearance), may nevertheless become subject to preclearance at a later date if subsequent changes—here, a change from at large voting to single member districts—create a

CONCLUSION

The district court's judgment should be reversed, and the case should be remanded for the entry of appropriate relief.

Respectfully submitted.

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JULY 1991

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potential for discrimination. In our view, the changes at issue in this case were subject to the preclearance requirement at the time they were made. Accordingly, the Court need not reach this additional contention. But if the Court were to reach this question, the position of the United States is that a change not subject to preclearance at the time it is implemented may not thereafter become subject to preclearance because of subsequent, unanticipated changes. The rule appellants argue for is not derived from the language or legislative history of Section 5, and would impose an unwarranted degree of uncertainty on state and local governments. Of course, efforts to evade the preclearance requirement by implementing a covered change in two or more steps are subject to preclearance. In addition, if a covered jurisdiction fails to submit a change that is subject to preclearance, and the Department of Justice thereafter reviews it, it will consider intervening developments in determining whether to interpose an objection. See *City of Rome* v. *United States*, 446 U.S. 156, 186 (1980).

APPENDIX

[Dec. 19, 1975]

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to your letter of September 9, 1975, concerning the adoption of a form of government by subdivisions in South Carolina under the provisions of Act R-396, the Home Rule Act. You requested clarification of a statement in my previous letter concerning the need for Section 5 preclearance of assigned forms of government which may include situations where no modification of existing government is involved. I apologize for the delay in responding.

With regard to counties, if a county is either assigned a form of government or retains a form of government which is identical in every respect to that which was in effect, without intervening change, since November 1, 1964, or has been implemented since November 1, 1964, and which has met Section 5 preclearance, then there would not be a change in a voting procedure within the meaning of the Voting Rights Act of 1965. However, Section 14-3701(b) provides that the type of government which will be assigned in the event a county does not elect to adopt another form of government will be a form "most nearly corresponding to the form in effect immediately prior to [July 1, 1976]". It thus appears that the Act anticipates that the exact form of government which is in effect on July 1, 1976, will probably not be assigned by operation of the Act and this

expectation would seem to be warranted at least in most cases in view of the broad new powers bestowed upon the governing body under the Home Rule Act.

In light of the Supreme Court's admonition in *Allen* v. *State Board of Elections*, 393 U.S. 544, 563 (1969), that Congress intended "that all changes, no matter how small, be subjected to Section 5 scrutiny", we believe that changes in the powers and duties of the governing entity brings the transition within the purview of Section 5 even though the structure of the governing body remains the same. However, in the event that procedures under the Home Rule Act should result in a county's retaining its previous form of government with powers and duties unchanged, then, of course, there would not be a change within the meaning of Section 5.

Likewise with regard to municipalities, if the form of government which a municipality adopts under the provision of Part II, Article 2, of the Act is identical to that which exists at the expiration of the period described in Section 6 of the Act, then, there would not be a change in voting under Section 5. However, if the new form of government which is selected by this municipality is different in any respect, including changes in the powers and duties of the affected entities, or if a municipality forfeits its articles of incorporation, then such action will constitute a change under Section 5.

I hope that we have been able to clarify this matter for you. If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

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